IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1780

RICHARD MADER, PATRICIA MAE NORTON, MARY RICHARDSON, and MARSENA DARLENE WALKER,
Petitioners,

vs.

GENTRY CROWELL, Secretary of State of the State of Tennessee; RAY BLANTON, Governor of the State of Tennessee and his successors in office; BROOKS McLEMORE, Attorney General of the State of Tennessee and his successors in office; DAVID COLLINS, Coordinator of Elections of the State of Tennessee; and JAMES E. HARPSTER, JACK C. SEATON, TOMMY POWELL, RICHARD HOLCOMB, and LYTLE LANDERS, Commissioners of the State Board of Elections,
Respondents.

RESPONSE TO PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited:

Statutes Cited:

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Respondents.

RESPONSE TO PETITION FOR REHEARING

Pursuant to the Court's Order of November 13, 1979, the Respondents herein respond to the Petition for Rehearing filed by the Petitioner in the above-styled action, and respectfully moves this Court to deny Petitioner's Petition for Rehearing.

STATEMENT OF THE CASE

On January 15, 1979, a three-judge Federal Court in Nashville held unconstitutional Tennessee Code Annotated, §3-102, which governed the apportionment of the Tennessee State Senatorial Districts. Respondents thereafter filed an in-

terlocutory appeal from this Order with this Honorable Court. Meanwhile, the Tennessee State Legislature revised Tennessee Code Annotated, §3-102 so as to comply with the decision of the three-judge Federal Court. Chapter No. 443, Tennessee Public Acts of 1979.

On October 1, 1979, this Court issued an order vacating the judgment of the District Court below and remanding this case to said Court with the instructions that this case be dismissed. On October 13, 1979, Petitioner filed a petition to rehear this Court's Order and on November 13, 1979, this Court requested a response to Petitioner's petition.

ARGUMENT

The Petitioner's Petition to Rehear Should be Denied as the Issue Originally Presented to the District Court is now Moot.

Petitioner originally brought this action to test the constitutionality of the apportionment of Tennessee's State Senate. As a result of Petitioner's action, said apportionment was declared unconstitutional and a new statute was enacted by the Tennessee State Legislature. In its order issued on October 1, 1979, this Court apparently found the issues in this case to be moot and remanded the case to the three-judge court with orders that it be dismissed. Petitioner complains that the Order of this Court prevents the District Court from reviewing the new statute enacted by the Tennessee Legislature in 1979.

This Court has held that "it is usual practice when a case has become moot" to remand the case to the District Court for dismissal. *U. S. v. Munsingwear,* 340 U.S. 36 (1950). Respondents acknowledge that this Court has previously stated that, in some instances, the case may be remanded with leave to Appellants to amend pleadings. See *Diffenderfer v. Central Baptist Church of Miami, Florida,* 404 U.S. 412 (1971). (Petitioners' have not amended their pleadings in the instant case,

but have merely written to the District Court requesting a hearing on the constitutionality of the new statute. See Appendix B, Motion of Appellees to Dismiss or Affirm, filed in the instant action). Respondents would submit that for a petition to rehear to be granted in a moot case, there must be a showing of unusual or extensive harm. There is no harm possible in the instant case.

If the petition to rehear is denied and this case is dismissed, the Petitioner may still contest the constitutionality of the 1979 statute by initiating a new action. Furthermore, contrary to Petitioner's assertions, this Court's original order does not deny Petitioner's attorney from being awarded attorney's fees. After an appeal, it is within the jurisdiction of the three-judge court to re-award attorney's fees, pursuant to 42 U.S.C. §1988. See, for instance, *Signal Men of America v. Southern Railway Company,* 380 F.2d 59 (4th Cir. 1967); *LaGarde Finance Company v. Vinet,* 346 F.2d 846 (5th Cir. 1965); *Boice v. Boice,* 56 F. Supp. 339 (D. N. J. 1944).

Respondents, on the other hand, may face substantial harm if the Petitioner's petition is granted. This Court indicated in *Gaffney v. Cummings* that the apportionment of legislative districts is basically a legislative task:

> From the very outset, we recognize that the apportionment task dealing as it must with fundamental choices about the nature of representation, is primarily a political and legislative process. We doubt that the Fourteenth Amendment requires repeated displacement of other appropriate state decision making in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say would deprive any person of fair and effective representation in his state legislature. *Gaffney v. Cummings,* 412 U.S. 749 (1973).

See also *Mahan v. Howell,* 410 U.S. 315 (1973); *Dush v. Davis,* 387 U.S. 112 (1967); *Sailors v. Board of Education,* 387 U.S.

105 (1967); *Burns v. Richardson,* 384 U.S. 73 (1972). The above cases mandate that until invidious discrimination is demonstrated in an attack upon the apportionment of State legislative districts, the burden rests upon the Plaintiffs and not the Defendants in apportionment cases. See also, *White v. Register,* 412 U.S. 755 (1973).

However, the District Court's Order implies that the Respondents and not the Petitioners have the burden of establishing the constitutionality of the new reapportionment act. Invidious discrimination need not be proved by the Petitioners. Such would appear to be contrary to the above decisions. On the other hand, if the Petitioners are compelled to bring a new lawsuit, the burden would rightfully be upon them to prove that invidious discrimination is behind the enactment of the new reapportionment.[1]

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[1]The initial apportionment act was declared unconstitutional due to large population variances; as noted in Appendix A submitted by the Respondents with this response, the populations of the new Senate Districts no longer retain their large population variances. However, the Respondents submit that the burden would still remain upon them to prove its constitutionality if this case were remanded to the Lower Court to reconsider the constitutionality of the new statute.

CONCLUSION

For the reasons stated herein, Respondents respectfully request that the Petition for Rehearing filed by Petitioners in the above-styled action be denied.

Respectfully submitted,

WILLIAM M. LEECH, JR.
Attorney General

ROBERT B. LITTLETON
Deputy Attorney General

WILLIAM W. HUNT, III
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Response has been forwarded to John L. Ryder, Esq., Laughlin, Halle, Regan, Clark & Gibson, 2201 First Tennessee Bank Building, Memphis, Tennessee 38103, on this the 12th day of December, 1979.

WILLIAM W. HUNT, III
Assistant Attorney General

APPENDIX

APPENDIX A

1979 Senate Districts

S.D.	Population	+ or −	%Variation
1	118,705	−265	−.22%
2	119,204	+234	+.20%
3	118,860	−110	−.09%
4	119,260	+290	+.24%
5	119,203	+233	+.20%
6	118,786	−184	−.15%
7	118,838	−132	−.11%
8	119,492	+522	+.44%
9	118,589	−381	−.32%
10	119,277	+307	+.26%
11	119,308	+338	+.28%
12	119,417	+447	+.38%
13	118,726	−244	−.21%
14	119,336	+336	+.31%
15	118,652	−318	−.27%
16	119,104	+134	+.11%
17	119,412	+442	+.37%
18	118,656	−314	−.26%
19	118,437	−533	−.45%
20	118,846	−124	−.10%
21	118,617	−353	−.30%
22	118,736	−234	−.20%
23	119,372	+402	+.34%
24	118,887	−73	−.06%
25	118,686	−284	−.24%
26	119,053	+83	+.07%
27	118,716	−254	−.21%
28	118,947	−23	−.02%
29	119,121	+151	+.13%
30	119,075	+105	+.09%

31	119,197	+227	+.20%
32	118,767	−203	−.17%
33	118,736	−234	−.20%

Maximum over 522	.44%
Maximun under 533	.45%
Total Variance	.89%
Average Variance + or −	.21%

.10% or under	6 Districts
.11% to .20%	10 Districts
.21% to .30%	10 Districts
.31% to .40%	5 Districts
.41% or more	2 Districts